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February 26, 2004

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 - 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Improving Public Safety Communications
in the 800 MHz Band, WT Docket No. 02-55

Dear Ms. Dortch:

Verizon Wireless fully supports the Commission's goal in this proceeding – to promote reliable public safety communications by resolving interference to public safety's operations in the 800 MHz band. We agree with the public safety community that the Commission should act expeditiously to address interference. The question is how to do so.

The purpose of this letter is to emphasize that there is a solution that is already before the Commission, which we call "In-Band Realignment." This solution would address public safety's interests by rebanding the 800 MHz band as various public safety groups have requested. It does not, however, suffer from the many flaws of the "Consensus" Plan. We urge the Commission to focus on In-Band Realignment as the best rebanding solution that will respond to public safety's needs and also best serve the public interest.

Nextel's Consensus Plan relies on realigning the 800 MHz band to eliminate "interleaved" commercial and public safety operations. It would address interference from Nextel's operations to public safety by separating Nextel's and public safety's spectrum and giving Nextel and public safety contiguous spectrum blocks. While Nextel and public safety believe this realignment is the right technical solution to interference, the "Consensus" Plan goes far beyond in-band realignment. It also would have the Commission grant Nextel, for free, a 10 MHz block of nationwide, contiguous spectrum at 1.9 GHz.

The record in this proceeding amply demonstrates why a giveaway of any 1.9 GHz spectrum is both technically unnecessary and legally unsound. That giveaway would itself do nothing to address public safety's interference problems being caused by Nextel. It would, however, violate the Communications Act and would be inconsistent with many Commission decisions setting rules for modifying licenses.¹ Worse, it would prevent the American public and the Government from benefiting from the value of that spectrum if it were auctioned, as the law requires. And it would grant an unconscionable windfall to a private entity.

On October 27, 2003, Verizon Wireless submitted a valuation report prepared by Kane Reece Associates, a national appraisal firm experienced in wireless industry valuations. The report appraises the fair market value of Nextel's current spectrum holdings as well as the value of spectrum that Nextel would acquire under the Consensus Plan. It concludes, "If the Consensus Plan were adopted, the value of Nextel's spectrum holdings would increase by \$7.2 billion." The Kane Reece valuation, summarized in an attachment to this letter, also draws two related conclusions regarding the spectrum Nextel would acquire:

- A giveaway of the 1.9 GHz PCS band as outlined in the Consensus Plan would result in a significant windfall to Nextel while denying the public the value of this public resource. The fair market value of 10 MHz at 1.9 GHz is appraised at nearly \$5.3 billion.
- Realignment of the 800 MHz band alone will result in an additional windfall to Nextel in the amount of \$2.3 billion, i.e., the fair market value of 6 MHz of contiguous spectrum at 800 MHz (appraised at \$3.2 billion) less Nextel's relinquishment of 8.5 MHz of non-contiguous spectrum at 800 MHz (appraised at \$900 million).

In-Band Realignment would address interference in precisely the same way that the Consensus Plan proposes, by adopting the rebanding proposal that public safety groups have advocated. It would, however, not give away valuable spectrum to a private entity but would auction that spectrum for the benefit of the American public. In short, it would address public safety's needs in a manner that far better serves the public's interest rather than Nextel's own interest.

The record contains numerous comments proposing in-band realignment. Many of these comments were submitted in the comment round of this proceeding in 2002. Other parties have consistently supported this solution. For example, a full year ago a group of companies stated:

¹ On December 4, 2003, CTIA filed a detailed legal memorandum explaining why the grant of 1.9 GHz spectrum to Nextel would be unlawful and in conflict with past FCC decisions. See Letter to Marlene H. Dortch, Secretary, FCC, from Diane Cornell, CTIA, in WT Docket No. 02-55 (Dec. 4, 2003) ("CTIA Legal Memorandum").

“If the Commission elects to pursue rebanding, it can do so according to the Nextel Plan without involving the 700 MHz, 900 MHz and 1.9 GHz bands.”² This record provides more than sufficient grounds for the Commission to adopt it. In-Band Realignment provides all of the benefits of the Consensus Plan without the serious problems inherent in that plan. Specifically, In-Band Realignment:

Addresses Interference to Public Safety. Rebanding 800 MHz as recommended by the Consensus Plan would separate Nextel’s operations from public safety’s operations. The parties to that Plan have concluded that rebanding is the best solution to interference. In-Band Realignment would provide precisely the same benefits in interference reduction.

Does Not Violate the Auction Requirement for New Spectrum or FCC Precedent on License Modifications. Unlike Nextel’s Plan, In-Band Realignment without any 1.9 GHz band giveaway would not violate Section 309(j) of the Communications Act. That provision directs the Commission to use auctions to award new spectrum licenses. Nextel has not adequately explained how or why it could be granted new spectrum licenses without winning them in an auction. In-Band Realignment would also not conflict, as would Nextel’s plan, with the Commission’s own precedent on the circumstances when it can order license modifications or license swaps, as detailed in the CTIA Legal Memorandum.

Preserves the Benefits of Auction Revenues for the Public. Removing the 1.9 GHz band from the Consensus Plan and auctioning it would allow the Government (not a private party) to receive the substantial benefits that a nationwide block of clear, contiguous spectrum would bring at auction. Congress could use those funds to finance extensive improvements for public safety, for homeland security, or for other important public interest goals. By contrast, giving 10 MHz (or any amount) of spectrum to Nextel would net the Government and the public not a single penny in additional revenue.

Fulfills the Commission’s Goals for Efficient Spectrum Use. The Commission has said many times that auctions are the best mechanism to ensure that spectrum is placed in the hands of entities that can derive the most value from it and thus will make most intensive use of that spectrum, which in turn provides tangible benefits to the public. In-Band Realignment achieves this goal. Giving away 10 MHz of spectrum would not.

Provides a Solution to Funding. As part of In-Band Realignment, the FCC should require Nextel to pay for all expenses related to realignment. Given the significant windfall that would accrue to Nextel through in-band realignment, Nextel should be obligated to pay for all

² A summary of comments supporting In-Band Realignment without a grant of free spectrum to Nextel is attached to this letter.

realignment expenses, to ensure that public safety licensees incur no cost from implementation of the plan.³

Under both the Consensus Plan and the In-Band Realignment plan, Nextel will receive 6 MHz of additional, contiguous nationwide spectrum adjacent to its existing 10 MHz of 800 MHz spectrum, and thus will benefit substantially. The Commission has several times acknowledged that contiguous SMR spectrum holdings are more valuable than non-contiguous ones.⁴

In addition, Nextel and the Commission have agreed that Nextel's non-contiguous SMR spectrum is worth less than contiguous spectrum held by other CMRS providers. When the Commission was considering establishing a CMRS spectrum cap in 1994, Nextel conceded that "the non-contiguous spectrum [then] available to SMR is not equivalent to the contiguous, exclusive use spectrum available to cellular," and argued that the Commission should not adopt a spectrum cap "that treats all CMRS spectrum as fungible when it simply is not."⁵ The

³ Assigning the cost reimbursement obligation to Nextel will be entirely consistent with the commitment made by Nextel's predecessor Fleet Call, Inc., when it sought Commission approval to create a wide-area "enhanced" SMR service. In that request, Fleet Call conceded that "[p]ublic safety licensees should be accorded full and continuing protection," predicted that actual interference from this new service would be limited, and proffered (in a supporting Engineering Statement) that case-by-case technical solutions would be available to solve "isolated cases" of interference. See *In the Matter of Fleet Call, Inc., for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules*, filed April 5, 1990, at 33-34 & Attachment A at A-13. Over time, Nextel's network was extended far beyond that envisioned in Fleet Call's initial request, and as a result, public safety radio systems suffer interference.

⁴ See *Development of SMR Systems in the 800 MHz Band, Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 17556 (1999), at ¶ 12 ("[B]locks of contiguous spectrum allow for more flexibility in terms of technological applications and innovation. Single channel licensing would not foster the kind of technological advancements that would allow SMR licensees, which typically operate multichannel systems, to compete with other CMRS licensees.") (footnote omitted); *id.* at n.32 (citing Nextel support for the licensing of contiguous spectrum); *Development of SMR Systems in the 800 MHz Band, Third Report and Order*, 9 FCC Rcd 7988 (1994), at ¶ 103 ("[A]ssigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers."); *Development of SMR Systems in the 800 MHz Band, Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970 (1994), at ¶ 77 ("[B]ecause of the non-contiguous nature of the channels, there does not appear to be a high degree of interdependency among them; and, the limited geographic scope of the licenses is likely to make them less valuable than the licenses for the MTA blocks.").

⁵ See Comments of Nextel Communications, Inc., filed June 20, 1994 in GN Docket No. 93-252, at 34, 35.

Commission found “merit” in these arguments and accorded SMR spectrum special treatment that did not fully count that non-contiguous spectrum Nextel held for purposes of the CMRS spectrum cap.⁶

Attached to this letter is a legal memorandum that demonstrates that the Commission has full legal authority to realign the 800 MHz band and to require Nextel to pay the expenses incurred by public safety licensees and other affected incumbents in the band as a result of them moving to different spectrum.⁷ The memorandum includes a chart that shows Nextel’s greatly improved spectrum position under rebanding, which Kane Reece appraises at an increased spectrum asset value of \$2.3 billion. It will cost Nextel far less than that increase in value to pay for relocation. In many other situations the Commission has required entities that displace existing users to pay relocation costs. As the memorandum states, “The Commission does not need Nextel’s consent or concurrence to take the steps necessary to protect public-safety licensees, nor does it need to reach out of the 800 MHz band to resolve interference with public-safety operations.”

Because Nextel’s occupation of the 821-824 MHz / 866-869 MHz band will require the relocation of incumbent public safety (NPSPAC) licensees, the Commission can require Nextel to compensate public safety for those expenses. Moreover, the Commission can require Nextel to pay for relocation expenses incurred by other licensees in the lower 800 MHz band that are displaced by the relocation of NPSPAC licensees to that spectrum. The legal memorandum concludes, “The FCC may require Nextel to bear the costs of relocating incumbent public safety licensees since Nextel would displace them from their spectrum and occupy it for its own use.

⁶ See *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988 (1994), at ¶275.

⁷ Verizon Wireless and other parties have also addressed the FCC’s authority to impose relocation costs. See, e.g., Comments of Verizon Wireless, filed May 6, 2002 in WT Docket No. 02-55 (responding to *Notice of Proposed Rule Making*), at 16-17 (FCC has “required applicants for a new service, as a condition to being licensed in the new service, to agree to pay the costs to clear the band”); Comments of Ad Hoc Wireless Alliance, filed May 6, 2002 in WT Docket No. 02-55 (responding to *Notice of Proposed Rule Making*), at 6 (“In all proceedings in which the Commission has required incumbent licensees to relocate, those incumbent licensees have been compensated for the cost of relocation by the entities that would receive the benefit of the new allocation or licensing arrangement.”).

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The Commission has ordered similar measures a number of times in the past and this policy has been sustained by the D.C. Circuit.”

The Consensus Plan and In-Band Realignment would both provide the same benefit to public safety. The Consensus Plan, however, also grants a huge, unlawful windfall to a single private entity. In-Band Realignment, by contrast, would make the Government and the American public winners instead of losers. The choice for the Commission should be clear.

Very truly yours,

/s/
John T. Scott, III

Attachments

cc:	Bryan Tramont	Walt Strack
	Sheryl Wilkerson	Aaron Goldberger
	Jennifer Manner	Michael Wilhelm
	Barry Ohlson	Sara Mechanic
	Sam Feder	Julius Knapp
	John Muleta	Jim Schlichting
	Edmond Thomas	Bruce Franca
	Jane Mago	Alan Scrimme
	Cathy Seidel	Lauren Van Wazer
	David Furth	Evan Kwerel
	D'wana Terry	Ken Carter

SUMMARY OF NEXTEL WINDFALL*

* Based on Appraisal of Kane Reece Associates, "Determination of the Fair Market Value of the Certain Portions of FCC Licensed Wireless Spectrum Proposed for Realignment by Nextel Communications, Inc. Under FCC WT Docket No. 02-55," filed with the Federal Communications Commission on October 27, 2003.

Nextel Existing Spectrum Proposed to be Relinquished:

	Fair Market Value (\$ Million)
700 MHz (4 MHz)	\$ 31
800 MHz (8.5 MHz)	\$ 898
900 MHz (3.8 MHz)	<u>\$ 331</u>
Total license value relinquished	\$1,260

Nextel Proposed Spectrum to be Granted:

800 MHz (6 MHz)	\$3,167
1.9 GHz (10 MHz)	<u>\$5,278</u>
Total license value granted	\$8,445

License Value Gained	\$7,185
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**THE FEDERAL COMMUNICATIONS COMMISSION
LAWFULLY MAY ORDER NEXTEL TO PAY THE COSTS OF
RELOCATING INCUMBENT 800 MHz LICENSEES**

February 27, 2004

Prepared by

Wiley Rein & Fielding LLP

for Verizon Wireless

I.

EXECUTIVE SUMMARY

Now pending before the Federal Communications Commission (“Commission” or “FCC”) are a number of proposals to remedy the interference to public-safety operations in the 800 MHz band caused by Nextel’s use of neighboring spectrum. This memorandum argues that the FCC has ample legal authority under the Communications Act to require that Nextel pay the costs of relocating incumbent 800 MHz licensees, as part of a comprehensive new spectrum band plan that ameliorates future interference and affords Nextel an improved home for its operations.

In particular, the FCC may require Nextel to bear the costs of relocating incumbent public-safety licensees, since Nextel would displace them from their spectrum and occupy it for its own use. The Commission has ordered similar measures a number of times in the past, and this policy has been sustained by the D.C. Circuit. The FCC’s authority to order Nextel to pay these relocation costs is enhanced by the agency’s special statutory duties to protect the needs of public-safety licensees. Finally, the Commission lawfully may require that Nextel assume the relocation costs of business and industrial users, since they would be moved as a direct result of Nextel’s relocation of the public-safety licensees.

II.

BACKGROUND

For several years, the Commission has been considering ways to alleviate harmful interference caused to critical public-safety communications in the 800 MHz band.⁸ Public-safety licensees include police and fire agencies, medical rescue teams, and other first-responders charged with protecting citizens’ lives and property.⁹ It goes without saying that these sorts of

⁸ See *Improving Public Safety Communications in the 800 MHz Band*, 17 FCC Rcd 7169 (2002).

⁹ See *id.* ¶ 11.

operations demand “a high degree of system reliability.”¹⁰ Regrettably, public-safety users are experiencing interference due to the operations of Nextel, a mobile-telephone licensee, in adjacent blocks of spectrum.¹¹ As a result, public-safety users have experienced difficulties ranging from “loss of coverage” and “signal quality problems on particular frequencies,” to “system access difficulties” and “prolonged response times.”¹²

The Commission has solicited comment from the public on how best to remedy the interference caused by Nextel’s operations. One possible solution would involve the relocation of certain public-safety licensees, which currently operate between 821 and 824 MHz (and in paired channels between 866 and 869 MHz), to a block of channels lower in the 800 MHz band. The spectrum vacated by these licensees would be licensed to Nextel for mobile-telephone services. Also, a number of business and industrial users would be relocated from their current home in a block of interleaved channels between 809.75 and 816 MHz (and in paired channels between 854.75 and 861 MHz), to elsewhere in the 800 MHz band. These users’ spectrum would be taken over by the public-safety licensees displaced by Nextel. In other words, Nextel’s displacement of the public-safety users would set off a chain reaction, as a direct result of which the public-safety users would displace the business and industrial licensees. (See Attachment A.)

Implementing these steps would both ameliorate the interference problems Nextel currently is causing to public-safety users in the 800 MHz band, and free up a valuable, contiguous block of spectrum for Nextel’s use. Indeed, this realignment would confer on Nextel an enormous windfall – which Kane Reece estimates to be worth nearly \$2.3 billion – by replacing its current pockmarked allocation with a large block of contiguous, nationwide spectrum in the 800 MHz band.

¹⁰ *Id.*

¹¹ *See id.* ¶ 10.

¹² *Id.* ¶ 14.

This rebanding scenario would include a requirement that Nextel pay the relocation costs of the public-safety licensees who find themselves evicted and reassigned to different spectrum in the 800 MHz band. Nextel also would pay to reassign the business and industrial users who must move to make room for the public-safety licensees displaced by Nextel. Relocation costs can include FCC filing fees, the costs of retrofitting existing equipment to operate at the new frequencies, and the costs of constructing entirely new facilities.

In the so-called “Consensus Plan,” Nextel characterizes its obligation to fund necessary relocation costs as voluntary and contingent. The contingency, according to Nextel, is the Commission’s approval of unrelated spectrum transactions that would give Nextel 10 MHz of spectrum at 1.9 GHz, in addition to a block of contiguous spectrum in the 800 MHz band. As detailed below, the Commission does not need Nextel’s consent or concurrence to take the steps necessary to protect public-safety licensees, nor does it need to reach out of the 800 MHz band to resolve interference with public-safety operations.

III. **ARGUMENT**

The D.C. Circuit has squarely held that the Commission has the legal authority to require entities that displace incumbent licensees, and that use the vacated spectrum for their own purposes, to bear the displaced users’ relocation costs. For instance, in *Teledesic LLC v. FCC*,¹³ the Commission required satellite providers who displaced fixed terrestrial licensees in the 18 GHz band, to pay the latter’s costs of relocation. The court upheld the obligation, explaining that when providers “displac[e] existing users” in a given band of spectrum, they can be “forced to pay those existing users to relocate to comparable facilities.”¹⁴

¹³ 275 F.3d 75 (D.C. Cir. 2001).

¹⁴ *Id.* at 86.

The policy approved in *Teledesic* is hardly an innovation. Rather, the Commission routinely has required that incumbent licensees' relocation costs must be borne by users who displace them and occupy their spectrum. In addition to the order at issue in *Teledesic*,¹⁵ the Commission in 1992 required PCS users to pay to relocate displaced fixed microwave users.¹⁶ In 1995, the Commission ordered certain SMR licensees to bear the costs of relocating displaced incumbent SMR licensees.¹⁷ And two years later in that same proceeding, the Commission reaffirmed the obligation to pay relocation costs.¹⁸ The D.C. Circuit just as regularly has given effect to orders containing these types of requirements.¹⁹

Precisely the same situation is presented in the 800 MHz matter. The Commission now is considering proposals that would move public-safety licensees from the spectrum between 821 and 824 MHz (and between 866 and 869 MHz), and that would award that spectrum to Nextel. Because Nextel, like the satellite providers in *Teledesic*, would step into the spectrum vacated by the incumbent public-safety users, the Commission lawfully can require it "to pay those existing licensees to relocate to comparable facilities."²⁰

The Commission's authority to require Nextel to shoulder relocation costs is enhanced by its "special statutory obligation with respect to [public-safety licensees]."²¹ Section 151 of the Communication Act mandates that the FCC allocate spectrum in a way that promotes the "safety

¹⁵ See *Redesignation of the 17.7-19.7 GHz Frequency Band, Report and Order*, 15 FCC Rcd 13,430 (2000).

¹⁶ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 (1992).

¹⁷ See *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order*, 11 FCC Rcd 1463 (1995).

¹⁸ See *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd 19,079 (1997).

¹⁹ See, e.g., *Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001); *Ass'n of Pub.-Safety Communications Officials – Int'l, Inc. v. FCC*, 76 F.3d 395, 400 (D.C. Cir. 1996).

²⁰ *Teledesic*, 275 F.3d at 86. The enormous financial windfall Nextel stands to receive from rebanding within the 800 MHz band – estimated to be worth nearly \$3.2 billion – confirms the propriety of requiring it to shoulder relocation costs. Nextel can certainly not be heard to complain if, in exchange for nationwide contiguous spectrum worth \$3.2 billion, it is made to pay relocation costs in the amount of \$850 million.

²¹ *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984).

of life and property”²² – a directive that has been construed to “require the FCC to give the[] needs [of public-safety users] priority over those of commercial broadcasters.”²³ The special status of public-safety licensees is reinforced by other provisions in the Communications Act. For instance, Section 337 requires the Commission to allow public-safety users access to any unassigned channels.²⁴ No comparable entitlement exists for other types of licensees.

The Communications Act’s legislative history likewise unambiguously reveals Congress’s intent to extend special treatment to public-safety operations. According to a 1981 Senate Committee Report, “radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury.”²⁵ The House of Representatives sounded a similar theme several years later: “The Committee believes, as it has stated on prior occasions, that public safety consideration should be a top priority when frequency allocation decisions are made.”²⁶ The Commission therefore has a heightened responsibility to ensure that any rebanding plan makes whole the public-safety users that would be displaced by Nextel.

For similar reasons, the Commission has the authority to order that Nextel pay the costs of relocating the business and industrial users from their current home in the interleaved spectrum to elsewhere in the 800 MHz band. These licensees would be displaced by public-safety users, because the public-safety users would be displaced by Nextel. In other words, Nextel would be ultimately responsible for the eviction of the business and industrial licensees, albeit one step removed. The FCC therefore may order Nextel to bear the costs of the private users’ relocation. Even though Nextel itself may not come to occupy their spectrum, their

²² 47 U.S.C. § 151 (2000).

²³ *Nat’l Ass’n of Broadcasters*, 740 F.2d at 1213.

²⁴ *See* 47 U.S.C. § 337(c) (2000).

²⁵ S. REP. NO. 97-194, at 14 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2250.

²⁶ H.R. REP. NO. 98-356, at 27 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2219, 2237.

relocation is a direct and necessary consequence of clearing spectrum for Nextel's use and is designed to ameliorate future interference from Nextel's operations.

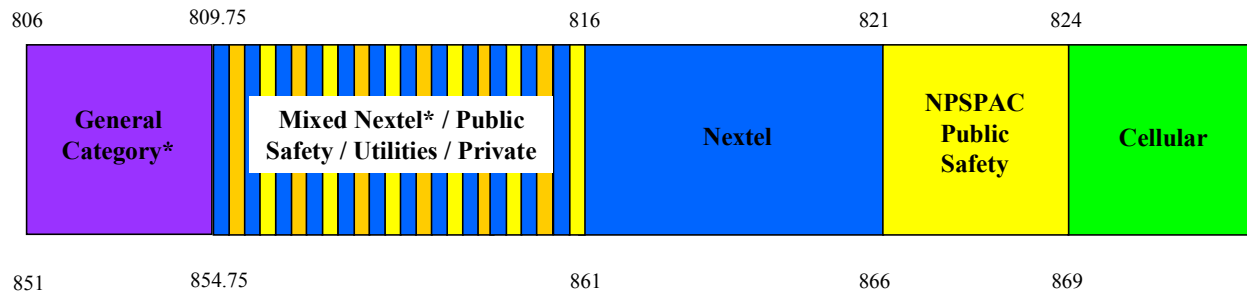
IV. CONCLUSION

Should the Commission decide to relocate public-safety users from their current home in the 800 MHz band, and to license Nextel to use that spectrum in their place, it would be well within its rights to order that Nextel bear the former's relocation costs. Whenever licensees "displac[e] existing users," they cannot complain if they are asked to "pay those existing users to relocate to comparable facilities."²⁷ Moreover, the Commission bears a special statutory duty to protect the interests of public safety licensees, as the courts have recognized. Nextel also can be made to pay the causally related "second step" relocation costs of the business and industrial users who would be moved as a direct result of Nextel's relocation the public-safety licensees.

²⁷ *Teledesic*, 275 F.3d at 86.

Attachment A

The 800 MHz Band Before Realignment



* Nextel has an average of approximately 4.5 MHz in the General Category and approximately 4 MHz in the interleaved Lower 800 MHz band, but does not have all the channels or all the geography licensed throughout the U.S.

The 800 MHz Band After Realignment

